



Scottish
Civil Justice
Council

**Interim Report on the *'Making Justice Work 1'*
Rules Rewrite Project**

by

**The Scottish Civil Justice Council Rules Rewrite
Working Group**

www.scottishciviljusticecouncil.gov.uk

CONTENTS

INTRODUCTION	1
REFORM OF COURT RULES – KEY QUESTIONS	3
APPROACHES TO RULES REFORM	5
UNIFORMITY V. SPECIFICITY	10
SIMPLICITY, MODERNISATION AND ACCESSIBILITY OF THE RULES	14
THE NEED FOR AN OVERRIDING OBJECTIVE	16
IMPLEMENTATION	18
PRIORITIES FOR REFORM	28
NEXT STEPS	34
SUMMARY OF RECOMMENDATIONS	35
SOURCES AND BIBLIOGRAPHY	39

INTRODUCTION

1. The Rules Rewrite Working Group (RRWG) of the Scottish Civil Justice Council (SCJC) has been established to develop and submit to the SCJC a “rules rewrite methodology” for the Rules Rewrite Project to frame the rules required to implement the recommendations of the Scottish Civil Courts Review (SCCR) and the Courts Reform (Scotland) Bill (“the Bill”) and to consider the prioritisation of separate phases of the rules revisions. The project is being carried out under the Scottish Government’s *Making Justice Work* Programme.

Members

2. The members of the RRWG are as follows:-

The Rt. Hon. Lord Gill	Chairman
The Rt. Hon. Lord Menzies	Deputy Chairman, SCJC member
The Hon. Lady Wolffe	
Sheriff Principal CAL Scott QC	Sheriff Principal of Glasgow and Strathkelvin
Kenneth Forrest	Advocate
Duncan Murray	Solicitor, SCJC member
Jonathan Brown	Office of the Scottish Parliamentary Counsel, Scottish Government
Prof. Frances Wasoff	Emeritus Professor of Family Policies, Edinburgh University, SCJC member

Remit

3. We have been specifically tasked with:

- (a) considering the vision and objective of the new rules;
- (b) undertaking a review of the approach that other jurisdictions have taken when undertaking similar projects such as England and Wales and Australia

to establish if any lessons can be learned (research may require to be commissioned in respect of this);

- (c) creating a “style guide” to underpin the drafting of the new rules (on the assumption that there requires to be consistency in approach to rule drafting for example, terminology, language, between the civil courts and across the different disciplines such as family and personal injury work);
- (d) agreeing the format and guidance for “drafting instructions” whether this be through the committee structure or the SCJC Secretariat; and
- (e) developing an annual rules rewrite programme which enables specific phases of rules to be prioritised.

4. We have prepared this Interim Report to assist the SCJC in developing its business programme for the year 2014/15. It is intended to issue a final report by summer 2014. In this report we address matters raised in paragraphs (a), (b), (c) and (e).

5. As part of its remit, the RRWG was tasked with undertaking a review of the approach that other jurisdictions have taken when undertaking similar projects to establish if any lessons can be learned. Consideration has been restricted to English-speaking jurisdictions with a broadly similar legal system, including England and Wales, Australia, Canada and Hong Kong. Consideration has been given to rules rewrite projects at state as well as national / federal level.

6. As well as paper based research, RRWG members and SCJC support staff have held a number of face to face discussions. A full list of meetings and conferences attended and sources is provided at page 39.

7. The report makes reference to observations and opinions expressed during meetings held under Chatham House rules and as such are unattributed.

8. We set out our views and recommendations in bold italics throughout the text.

Acknowledgements

9. We have been fortunate in being able to learn from others who have undertaken exercises similar to that before us. We would like to thank all those have shared with us their wealth of experience and knowledge for their generosity and time. Particular thanks are due to the Master of the Rolls and his policy team, who facilitated an extremely productive and informative series of meetings with

academics and members and staff of the Civil Justice Council and Civil Procedure Rule Committee during our visit to England and Wales.

10. We are also grateful to Julius Komorowski, Advocate, whose research and analysis of the approaches adopted in other jurisdictions has been of great assistance to us.

REFORM OF COURT RULES – KEY QUESTIONS

11. In developing this report, we have given consideration to the following questions:

General approaches to rules reform

- What approaches have other jurisdictions taken to the practicalities of reform in terms of planning, prioritising and resourcing?
- What priorities did they select?
- Should procedural reform be fully integrated with costs reform? Is the success of the former dependent on the latter? Are there any particular areas where reform will have/had a swift and noticeable impact?
- How are changes to the rules made?

Uniformity v. Specificity

- Which jurisdictions have adopted uniform rules for all courts, and which have retained separate rules for different tiers of courts (and different types of cases)? What was the rationale for doing so?
- Which is more preferable or achievable: separate rules, or a uniform code?
- Will rules inevitably creep towards specificity as apparent gaps arise?
- Is it sufficient to aim for harmonisation of procedures and how might this be ensured over time?

Simplicity, modernisation and accessibility of the rules

- To what extent should simplicity of vocabulary and procedure be pursued in framing rules?
- How have other jurisdictions arrived at a simpler style for rules and have any subsequent issues arisen?
- How can the rules meet the needs (and the growing number) of party litigants? Is there a tension between the need to support party litigants in

conducting proceedings and the need to prevent unnecessary use of court time and abuse of process? How best should that be managed?

Overriding Objective

- Should an overriding objective be adopted? What has been the experience of other jurisdictions of the application of such an objective?
- What should the features of any such objective be?

Implementation

- How practical is case management and docketing? What changes to behaviours, training and processes are needed to support this? What ICT changes are required?
- What non-legislative measures are required to assist with implementation?
- What transitional arrangements should be put in place?
- How are rules changes best communicated?

Monitoring and evaluation

- What evaluation has been undertaken to determine if new rules have proved successful? How has success been measured and what factors should be considered in doing so?

APPROACHES TO RULES REFORM

General approaches

12. We have considered rules rewrite projects in other jurisdictions and set out a summary of our findings below.

Alberta, Canada

13. The re-writing of rules requires time and manpower. The demands that can arise are graphically set out in Alberta. That seems a reasonably comparable jurisdiction to Scotland, being a jurisdiction within a larger Western democratic state with a population of 3.6 million people. It seems likely that their volume of business could not be much more, and quite possibly significantly less, than that faced by the Scottish courts.

14. The following discussion derives from the Alberta Law Institute, Alberta Rules Project: Final Report, October 2008.

15. The rules in Alberta had not been comprehensively reviewed since 1968. But the courts were functioning reasonably well; it was not what the Institute described as an exercise in crisis management. This may have contributed to the elaborate time and effort taken, because the reforms were not seen as urgently needed.

16. The project proposal was costed at CAN \$2.6 million. That amounts to about £1.6 million today in UK currency, though that figure must be used with great caution since the Alberta Project started more than ten years ago when relative currency values might have been much different.

17. The Institute conducted initial research into similar projects elsewhere in Canada, in the United States and beyond. A period of consultation with the legal community began in the autumn of 2001. A wider public consultation was then conducted, the response to which was said to be “sufficient, but disappointing.” Focus groups were held in the autumn of 2002.

18. A series of working committees were set up. One, the Management of Litigation Working Committee, was to consider issues from a “big picture” perspective and dealt with pre-trial meetings, case management and the running of trials or proofs. Many tasks did not fit easily in to a committee and so were assigned to the General Rewrite Committee.

19. Each committee was chaired by a judge and assisted by lawyers from the Institute. They prepared background research material, wrote “issues documents”, reduced working committee discussions in to consultation memoranda, analysed consultation responses and finally issuing drafting instructions.

20. 21 consultation memoranda were issued.

21. The working committees were told not to prepare policy by drafts. Policy formulation and drafting was to be kept distinct. A committee would make recommendations. Once approved by the Institute, an “instructing officer” (one of the Institute’s lawyers on the committee) would draft instructions to the draftsman. The instructing officer would review drafts and liaise between the committee and the draftsman. The draftsman was not to formulate policy: “on substantive issues of policy, the working committees’ decisions and instructions prevailed. On stylistic issues of legislative drafting, the drafter’s opinion prevailed.”¹

22. Significant work had to be done to harmonise the different drafts in to one composite. “Test Draft 3” was distributed to the committees and the legal profession for comment in March 2007, with responses to be received by spring 2008. A series of presentations were conducted by the Institute during this time. During this time discussions also took place with the statutory Rules of Court Committee. This culminated in a final draft in May 2008.

23. Thus from initial canvassing of views to final proposals, seven and a half years passed.

24. At what the Institute describe as the “rule development” stage, which we infer is meant to cover the period up to the first compilation of the various drafts, the Institute calculated that over 30,000 hours of committee members’ time was taken up. Assuming an average of 1,647 working hours in a year,² that is the equivalent of 18 full time staff working for a year.

Hong Kong, China

25. Hong Kong has a population of 7 million people and a GDP per capita in “International dollars” of \$51,946, compared to \$36,901 for the United Kingdom.³

¹ [Alberta Rules Project: Final Report, October 2008](#), para. 31

² <http://www.bbc.co.uk/news/magazine-18144319>

³ According to the World Bank: <http://databank.worldbank.org/data/views/reports/tableview.aspx>

This suggests a likely much greater volume of litigation than Scotland, so any comparison with us must be limited.

26. A Working Party was appointed in February 2000, consisting of eight judges, one government lawyer and one barrister who was later elevated to the bench. The Party issued an Interim Report in 21 November 2001. A seven-month consultation period followed during which certain public events were held by the Party. A Final Report was issued on 3 March 2004⁴; that is, around two years after the consultation closed. This exercise was limited to the High Court, that is the senior civil court. At this point, the decision was taken to alter the existing rules as required to accommodate the recommended reforms, rather than attempt a comprehensive re-write.

27. A Steering Committee, consisting of eight judges or judicial office holders, was appointed in March 2004, to consider necessary amendments to primary and secondary legislation.

28. The Chief Justice directed in December 2005 that similar reforms should be enacted for the District Court, that is the inferior civil court:

“As the practice and procedure in civil proceedings in the District Court largely mirror those in the High Court, it was considered appropriate for the two levels of Court to have the same set of procedures consequent on the CJR.”⁵

29. Proposals for amendments to primary legislation together with draft rules were made in 2006. Primary legislation was introduced for consideration by the legislature in April 2007. A further round of consultation was conducted by the Steering Committee in October 2007. Primary legislation was enacted in February 2008. The new rules came in to force on 2 April 2009.

30. Thus from start to finish the process has taken nine years. It is not easy to make a direct comparison to Scotland. Much of the work by the Working Party covered ground that has perhaps already been dealt with by the SCCR. Also the changes to the rules and to primary legislation were dealt with in tandem in Hong Kong. From when the Steering Committee was convened, to its first draft rules, a period of about two years elapsed in a situation where the policy underlying the new rules was quite

⁴ Chief Justice’s Working Party on Civil Justice Reform, [Civil Justice Reform: Final Report](#) (2004)

⁵ Steering Committee, [Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform](#), para 1.7

clear. It appears likely that much time was saved in comparison to Alberta because a make-do-and-mend approach was adopted rather than a comprehensive rewrite.

Courts Reform and Costs Reform

England and Wales

31. A major set of civil justice reforms was implemented in England and Wales following the recommendations of Lord Woolf's final Access to Justice Report of July 1996. On the basis of the principle that the court should be responsible for the management of litigation before it, a fast track procedure for lower value, straightforward cases, to a timetable, with restricted procedures and fixed costs, was introduced. For higher value, more complex actions, a multi-track procedure was introduced, with cases subject to active judicial management. Lord Woolf was also asked to produce a single, simpler, set of rules for the civil courts. The Civil Procedure Rules (CPR), a single set of rules replacing the Rules of the Supreme Court and County Court Rules, were brought in as part of those reforms.⁶

32. In April 2013, wide scale costs reforms were introduced, predicated on the recommendations of Lord Justice Jackson's 2009 Review of Civil Litigation Costs. In order to help reduce the disparity between the cost of bringing a litigation and the sum sought, a system of costs management has been introduced, whereby parties must prepare and agree a costs budget at the beginning of a case, for the court's approval by way of a 'costs management order'. The amount which may be recovered from another party may only depart from the estimated costs for good reason. Additionally, Conditional Fee Agreements (CFAs) and After the Event (ATE) insurance premiums are no longer recoverable from the losing party (except in insolvency cases, which are being considered separately).⁷

Scotland: the current context

33. The SCCR, which reported in 2009 and which was commenced before the review by Lord Justice Jackson, did not consider in full the issue of expenses in litigation, recommending instead that a separate review be carried out.⁸ Sheriff Principal Taylor was subsequently commissioned by the Scottish Government to carry out his

⁶ Lord Woolf Access to Justice 1996 Final report, available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm>

⁷ Review of Civil Litigation Costs: Final Report, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>

⁸ SCCR (2009), Ch. 2 Para. 76

Review of the Expenses and Funding of Civil Litigation in Scotland, which reported in September 2013.

34. Sheriff Principal Taylor's key proposals include:

- **qualified one way costs shifting (QOCS):** the pursuer in personal injury actions should no longer be liable to pay the defender's expenses in the event of loss.
- **no win no fee agreements:** solicitors should be able to offer clients damages based agreements (whereby they receive a fee based on a percentage of the damages recovered). However, this should be capped, and the proportion of fees should be on a sliding scale so that the proportion reduces as damages increase. (Such direct arrangements between solicitors and their clients in Scotland are not enforceable and as such, are handled by claims management companies.)
- **speculative fee agreements:** success fees under speculative fee agreements should be capped at 50% of the monetary award.
- **fixed expenses:** a system of fixed expenses should be introduced for actions proceeding under the 'simple procedure' (as proposed in the Courts Reform (Scotland) Bill) except those involving personal injury.
- **judicial management of expenses:** with the court able to make summary assessments and awards of expenses in commercial actions, with estimates of expenses to be provided at the outset.
- **claims management companies should be regulated by an appointed regulator**
- **review of the level of fees for litigation:** in order to address the disparity between the amount of recovered expenses and the cost of litigation, a subcommittee of the SCJC should be formed to review the level of fees for litigation that may be recovered as expenses.

35. The SCJC will be giving full consideration to Sheriff Principal Taylor's recommendations and to what extent any implementation of costs reform should be introduced alongside courts reform. To that end, it has established a Costs and Funding Committee to consider, among other things, the detail of Sheriff Principal Taylor's recommendations. The Committee will work collaboratively with the Lord President's Advisory Committee, which currently considers proposals and recommendations for changes to the rules relating to solicitors' fees and judicial expenses in civil court actions.

UNIFORMITY V. SPECIFICITY

36. The question of whether a single, uniform set of rules is preferable to separate rules for separate courts has been considered by a number of other jurisdictions where similar rules rewrite projects have been carried out.

The approach in other jurisdictions

England and Wales

37. In 1999, the Woolf reforms replaced the Rules of the Supreme Court and the County Court Rules with a single, unified, procedural code. The objectives of the exercise were:

- (a) to identify the core propositions in the rules and to cut down the number of interconnecting provisions which are used;*
- (b) to provide procedures which apply to the broadest possible range of cases and to reduce the number of instances in which a separate regime is provided for a special type of case;*
- (c) to reduce the size of the rules and the number of propositions contained in them;*
- (d) to remove verbiage and to adopt a simpler and plainer style of drafting;*
- (e) to give effect to the substantive reforms which I am proposing.⁹*

38. The new code has been added to over time to quite some extent and it is recognised that there will inevitably be special procedures which require special rules (i.e. there is no 'one size fits all'). The CPR when introduced had 51 Parts, and now has 81; many of Parts 52 – 81 are very specialist.

39. The 'old' rules which have not yet been revised have been drawn into the CPR in their entirety as schedules and are referred to by previous numbering.

Northern Ireland

40. Northern Ireland has adopted separate rules for the County Courts and High Court, with proceedings in each being raised in different ways. The Civil Justice Reform Group considered that "while it is appropriate to retain a relatively informal civil bill system in the County Courts, the value [in excess of £150,000] and potential

⁹ Lord Woolf (1996) *Access to Justice in England and Wales* Ch. 20

complexity of cases initiated in the High Court justify more attention to detailed pleadings.”¹⁰

41. The Group had initially recommended that procedural rules for all civil courts should be taken forward by a unified rule making committee “to ensure procedural consistency between the High Court and County Courts”. However, in light of support to retain the procedures in the County Courts and concerns that a common committee would concentrate on the High Court to the County Court’s detriment, it was decided that there should be separate committees with a common secretariat to assist with consistency.¹¹

42. It seems unlikely that the claims in the sheriff court of up to £150,000, as proposed by the Courts Reform (Scotland) Bill,¹² would be so different in levels of complexity to justify a separate form of pleading in the Court of Session. There is no substantial difference in pleadings dictated by the differing sheriff court and Court of Session rules. The practice of solicitors varies a little from counsel, but the principles for pleading an initial writ or a summons are the same. Abbreviated pleadings are to be used in the sheriff court and Court of Session for actions for personal injury, regardless of their value. So the rationale in Northern Ireland for adopting separate sets of rules does not seem to hold true in Scotland.

Victoria, Australia

43. The Victorian Law Reform Commission considered, but rejected, establishing one unified rules council. It felt that separate rules committees should be retained because of the discrete areas dealt with by the courts, but that “arrangements should be put in place to ensure there is appropriate communication between the committees.”¹³

44. The Commission also considered the question of uniformity and harmonisation of procedures. The Commission examined the exercises that had been carried out in New South Wales, Queensland and the Australian Capital Territory to introduce a single set of rules across all courts. While it did not consider that there had been problems with those approaches, it was “not persuaded that a ‘uniform’ set of rules

¹⁰ Civil Justice Reform Group, *Review of the Civil Justice System in Northern Ireland: Interim Report*, April 1999, para 9.11

¹¹ Civil Justice Reform Group, *Review of Civil Justice System in Northern Ireland: Final Report*, June 2000, para 165

¹² At section 39

¹³ Victorian Law Reform Commission, *Civil Justice Review Report*, March 2008, pp. 710-711

is required in Victoria, having regard to the variety of areas of law and types of litigation conducted in each court.”¹⁴ The Commission did, however, consider that:

*...additional steps should be taken to achieve a greater level of harmonisation between the rules of the various courts, in particular in relation to terminology and forms. Greater harmonisation should not compromise the procedures adopted in particular courts or subject areas to achieve specific objectives, for example the procedures for dealing with small claims in the Magistrates’ Court. We also believe the rules of the Victorian courts would benefit from a further detailed review aimed at simplifying their structure and language, and bringing them in line with procedural rules in other jurisdictions.*¹⁵

Alberta, Canada

45. Following a Rules Project, led by the Alberta Law Reform Institute, the new Alberta Rules of Court (AR 124/2010) came into force on November 1, 2010. The rules had not been subject to significant review since 1968. The Institute aimed to introduce a “single, comprehensive and consistent procedural code”¹⁶ and argued for a reduction in the different time periods across the rules reduced (e.g. instead of 2 days, 3 days and 5 days, only employ periods of 5 days), that a uniform definition of day be adopted and that a uniform means of calculating time be used.

46. The Institute was not of the view that a uniform code should apply to all categories of case, however:

The Committee’s guiding principle ... was to avoid a self-contained code of rules for judicial review, and to strive for specialized rules, where necessary, built on the existing foundation of the general rules. For the most part, the current use of the general rules as a default ... remains the most appropriate model.

At the same time, the Committee recognized ... that special procedures or other departures from the model in the general rules are required by certain important distinctions between public law litigation and ordinary civil litigation. The Committee’s litmus test for raising proposals for reform was, in considering each issue outlined below:

‘Is there any basis rooted in the uniqueness of judicial review proceedings for departing from the general rules on this issue?’¹⁷

¹⁴ Victorian Law Reform Commission, *Civil Justice Review Report*, March 2008, pp. 710-711

¹⁵ Victorian Law Reform Commission, *Civil Justice Review Report*, March 2008, pp. 710-711

¹⁶ Alberta Law Reform Institute, *Rules of Court Project, Final Report*, No. 95, October 2008, p. 5

¹⁷ Alberta Law Reform Institute, *Alberta Rules of Court Project: Judicial Review*, August 2004, p xii

Should there be a uniform set of rules for the Scottish civil courts?

47. The question of whether there should be a uniform set of rules has been the subject of debate within our group.

48. We consider that neither approach is preferable in and of itself. The rules need to be responsive to changes in the law, and social trends, so a comprehensive or 'perfect' code is not achievable. Gaps will arise once new rules are introduced and the courts can be expected to rely on the body of established procedure to address these. To facilitate flexibility, rules should be enabling in nature.

49. It appears to us that while there are attractions in adopting a unitary code, there are on balance better reasons for retaining separate rules for the sheriff court and Court of Session. While it may be helpful for practitioners to be able to refer to just one set of procedures, there are many instances in which rules may need to reflect the different character or complexities of certain categories of case proceeding through those courts. While we support the aim of harmonisation of procedures, we do not consider that absolute uniformity of procedure is necessary or necessarily appropriate.

50. In addition, we are concerned also that the resources which would require to be deployed to secure a unitary set of rules are very substantial, and that the potential benefits are unlikely to outweigh the cost. It is becoming increasingly clear that the resources required to implement a full transition to a unitary code are likely to be significantly in excess of the resources available to the Rules Rewrite Project. This is especially so given the timetable for implementation of civil courts reform, and the complexities of recasting the existing rules as a unitary code at the same time as introducing a suite of structural changes to the civil courts and judiciary.

51. All of that said, we consider that to assist in providing legal certainty and so as to decrease the likelihood of satellite litigation, there is merit in using identical wording wherever possible and appropriate in order that the higher courts' decisions on the meaning of particular rules will be directly relevant and binding across as many cases as possible.

52. In addition, it has been suggested to us that where uniform rules for different courts and tribunals are not adopted, concepts such as time and final judgments should be defined identically. That would avoid sterile debate over minor variations in language between rules of different courts which required the same issue to be re-argued each time in each forum.

53. *We are of the view that separate rules for the sheriff court and the Court of Session should be retained. However, we consider that harmonisation of procedures should be pursued (and we note that this is one of the guiding principles to which the SCJC is required to have regard when carrying out its functions¹⁸). With the exception of the simple procedure, which is to be designed with party litigants in mind and should retain a distinct and special nature, a consistent framework should be established, so that where appropriate, the rules of the sheriff court and Court of Session should be identical in procedure and wording.*

SIMPLICITY, MODERNISATION AND ACCESSIBILITY OF THE RULES

The Rules Rewrite Project

54. The current rules of court have arisen on a piecemeal basis over several decades, and in some cases centuries. They reflect the multiple outcomes of having separate rule making bodies with differing priorities operating over differing timelines. As a consequence there is a level of duplication and specialisation of rules which adds unnecessary layers of complexity. The Rules Rewrite Project has been commenced to make those rules more accessible to all court users through a process of consolidation, harmonisation and simplification and to support the once in a generation reform to the civil justice system as proposed in the SCCR.

55. Through the project, which will last around ten years, the rules of the civil courts in Scotland will be fundamentally rewritten and, through the establishment of the SCJC, will be subject to regular review. It is important to note that the SCJC, in preparing the rules, must have regard to the following principles:

- (a) the civil justice system should be fair, accessible and efficient,*
- (b) rules relating to practice and procedure should be as clear and easy to understand as possible,*
- (c) practice and procedure should, where appropriate, be similar in all civil courts, and*
- (d) methods of resolving disputes which do not involve the courts should, where appropriate, be promoted¹⁹*

¹⁸ Subsection 2(3) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (“the 2013 Act”) contains the principle that “practice and procedure should, where appropriate, be similar in all civil courts”.

¹⁹ As provided for by section 2 of the 2013 Act

56. In general terms, the views that have been expressed in discussions with us are that simplicity should be pursued wherever possible as greater complexity leads to reduced compliance, and reduced enforceability.

57. The experience in England and Wales has been that there is benefit in re-enacting the wording of an existing rule, in a new set of rules, as the relevant case law will shift across to the new rule. Where judicial authority suggested any ambiguity in the old rules, the approach taken in England and Wales has been to take the opportunity to clarify the matter.

58. *We endorse this approach. We do not, however, recommend carrying out a specific exercise to identify any such ambiguities, rather that these should be addressed as rules are rewritten. Where judicial authority has brought a benefit, although out of date language has been used, then it may be beneficial to retain that language. We think that the question of whether an individual rule should be replicated in the new rules will require to be considered on a case by case basis.* We believe, however, that outdated language should only be retained where there is concern that any rewording might, rather than adding certainty to the operation of the rule, give rise to argument on its interpretation. *However, we consider that out of date or complex language should not be restated in the simple procedure rules on this basis as party litigants should not be expected to rely on case law.*

Party litigants

59. The simplicity (whether in terms of language or procedure) and accessibility of the rules is particularly important when considering the needs of party litigants and how cases conducted by them proceed through the courts. We recognise that party litigants are no longer an unusual presence in the courts and believe that legislation should recognise them.

60. There is not a consensus that greater simplicity will necessarily assist party litigants across all procedures – it is felt by some that a practitioner’s degree of experience and knowledge is necessary to navigate the law and court processes, however simply expressed. The difficulties party litigants face may not only be related to the language of the rules, for example, because of the complexity of the issues and the necessary procedure that must be followed in some circumstances. In some circumstances, the pursuit of simplicity could also pose difficulties in transitioning to new rules.

61. With regard to party litigants, it was suggested to us that the more that is included on the face of the rules, the less need there is for additional guidance and explanation. If the rules are difficult to follow, sanctions (particularly costs

sanctions) can have serious implications for a party litigant if applied rigidly. Where a rule must be (or is) complex, this can be mitigated by the court being very clear when making any relevant order – the wording of any such order being key.

62. Other non-legislative measures that could be taken forward include the creation of guidance (for party litigants themselves, but also for court staff, practitioners and the judiciary) and a code of conduct for party litigants. The introduction of any code would need careful consideration, particularly as to its enforcement (and enforceability) and how any obligation should be balanced against the need to ensure access to justice for litigants. However, there may be other means by which the expectations of the court can be made clear to party litigants. We believe that the issue merits further thought.

63. As party litigants will be regular users of the simple procedure (which will replace small claims and summary cause procedure) proposed in the Courts Reform (Scotland) Bill 2014, we consider that it is vital that simple procedure is designed with party litigants in mind.²⁰ As such, it ideally should not require complementary guidance (and indeed we suggest that the procedure itself could be drafted in such a way that it 'guides' litigants step-by-step through the court process).

Accessing the rules

64. The CPR in England and Wales are available online and are uploaded and maintained by the Civil Procedure Rule Committee Secretariat, alongside their relevant practice directions, guidance and pre-action protocols. While these documents are all made available on the Scottish Court Service website in Scotland, they are not similarly consolidated. *We consider that it would be beneficial to make the rules for Scotland accessible in similar fashion.*

THE NEED FOR AN OVERRIDING OBJECTIVE

65. The Group has considered the question of an overriding objective for the rules. There is a question as to the content, but also as to whether any statement within the rules should be of pre-eminent and binding nature, or whether it should be limited to a statement of intent.

²⁰ SCCR Ch. 5, paras. 125-131. The report recommends that it should be, and made a number of proposals as to its features.

66. England and Wales and a number of other jurisdictions, including New South Wales, Northern Ireland and Queensland have adopted an overriding objective in their rules of court. Hong Kong's Civil Justice Reform Working Party, established to review the civil rules and procedures of the High Court in Hong Kong did not recommend the adoption of an overriding objective, on the basis that it would lead to satellite litigation.²¹

67. The Woolf reforms introduced into the Civil Procedure Rules an overriding objective which specifies that the rules have an "overriding objective of enabling the court to deal with cases justly and at proportionate cost".²² The application of the overriding objective sits squarely with the courts. The question of 'proportionality', (which the court must consider when ruling on costs - introduced into the Rules under the Jackson reforms²³) is not yet fully defined or understood.²⁴

68. It has been suggested to us that too many factors within an overriding objective leads to less clarity for the court and to less certainty. Three things that were thought to be essential ingredients in any objective were: reaching a just outcome, in a reasonable time, at a reasonable cost.

69. The SCCR concluded that a preamble (rather than an overriding objective) should be adopted:

"We...are concerned that an objective of an overriding nature capable of trumping the express provisions of the rules might lead to inconsistent and uncertain results. We believe that the adoption of a guiding principle will assist the court and litigants in the operation of the rules, but that the guiding principle should not be overriding. We therefore recommend that a preamble should be added to the rules of court identifying, as a guiding principle, that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, in a fair manner with due regard to economy, proportionality and the efficient use of the

²¹ Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform – Final Report* (2004), available at

<http://www.legco.gov.hk/yr06-07/english/bc/bc57/papers/bc570611cb2-1960-e.pdf>

²² [CPR Rule 1.1](#)

²³ CPR Rule 3.9 states: "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the Court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need – (a) For litigation to be conducted efficiently and at proportionate cost; and (b) To enforce compliance with rules, practice directions and orders"

²⁴ See for example Lord Neuberger, *Docketing: Completing Case Management's Unfinished Revolution* (9 February 2012) (9th Lecture in Implementation Programme) and Zuckerman. A, *The revised CPR 3.9: a coded message demanding articulation*, (2013) 32 CJQ 123, p. 123ff

resources of the parties and of the court. Such a preamble is necessary, we think, in order to highlight the importance of the role of the court in case management.”
(Recommendation 112)²⁵

70. In light of the recent experience in England and Wales, where the overriding objective is subject to some testing in the courts, we have considered the point afresh as there is some evidence that an overriding objective is a key component in judicial case management.²⁶ We consider that that placing an objective within the rules would be essential to ensuring effective case management but that were it to have an overriding and binding effect that that might cast doubt on the applicability of individual rules and lead to satellite litigation.

71. We are of the view that there should be a statement of principle and purpose in both the sheriff court and Court of Session rules, to which the court should have due regard, but that it should not override the other rules of court. The statement should be founded on recommendation 112 of the Scottish Civil Courts Review, and should indicate that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, within a reasonable time, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court, and that parties are expected to comply with the rules.

IMPLEMENTATION

Managing Litigation

72. The strong view expressed by many commentators is that the management of litigation should sit with the court²⁷ and that a robust approach to case and costs management, with the availability of appropriate sanctions, is essential to ensuring the success of procedural reform and adherence to the rules.

73. Moreover, Strasbourg case law has made it clear that delays in progressing a case through the courts will be attributed to the Member State, even where the parties have themselves authored or contributed to the delay. The judicial systems of the Member States are now faced with the necessity of actively managing their case-load, if they are to avoid liability for Article 6 (right to a fair trial) delay cases.

²⁵ SCCR Ch. 5, paras. 12-13

²⁶ See para. 77 below for discussion of the *Mitchell* case.

²⁷ This has been expressed to us in a number of discussions.

The most striking recent example of this is [Anderson v. United Kingdom](#) [No. 19859/04, 9 February 2010] in which, though almost every delay was due to the inactivity of the litigant who took the Article 6 claim to Strasbourg, the Member State was held responsible.²⁸

74. Professor Zuckerman advocates that the court as a public service provider should, as with any other public service, provide a managed service, balancing resources against the quality of service.²⁹ Improved management of the system will be delivered by effective case management – either case flow management, by the timetabling of the process, or active judicial case management. To maximise the benefits of management of the system it is imperative that such timetabling or directions are complied with. Sanctions including strike out are likely to have a role to play in promoting compliance and there should be little or no discretion to allow relief from sanctions for non-compliance.

75. We consider it essential that management of litigation transfers to the courts, and that judges and the judicial system take a proactive stance in managing the progression of cases through the courts.

76. Careful thought will require to be given as to how observance of the rules might best be ensured. We consider that a range of legislative and non-legislative measures will be needed to bring about the necessary shift in culture and practice. This report sets out our initial views on some steps that should be taken to assist this. For example, we make suggestions as to the key features of an overarching objective for the rules of court and are of the view that specific consideration should be given to rules for sanction and enforcement as part of the Rules Rewrite Project, as well as what supporting measures should be introduced. Any such measures (legislative or otherwise) will need to be balanced against the need to ensure access to justice for litigants and we believe that this should be borne in mind in any review of such measures. We do however commend that regard be had to the maxim “justice delayed is justice denied”.

²⁸ Anderson, at para.28 “As the Court has frequently stated, the State remains responsible for the efficiency of its system; the manner in which it provides for mechanisms to comply with the reasonable time requirement – hether by automatic time-limits and directions or some other method – is for it to decide. If a State allows proceedings to continue beyond the “reasonable time” prescribed by Article 6 of the Convention without doing anything to advance them, it will be responsible for the resultant delay (*Bhandari v. the United Kingdom*, no. 42341/04, § 22, 2 October 2007, together with further references therein)”.

²⁹ Zuckerman, A. 'Litigation Management Under the CPR: A Poorly-Used Management Infrastructure...', in *The Civil Procedure Rules: Ten Years On*, D. Dwyer (ed.) (Oxford: Oxford University Press, 2010), pp. 89–108.

77. In particular, it appears that a firm stance by the appellate court from the outset is necessary to ensure that the rules are complied with. In England and Wales, this is facilitated by an arrangement whereby one of a panel of five judges (the so called 'Jackson five') sits on every appeal related to the Jackson reforms. The recent appeal case *Andrew Mitchell MP v. News Group Newspapers Ltd.* [2013] EWCA Civ 1537, (where the costs judge's ruling that the appellant's recoverable costs should be limited to court fees only following the late submission of his budget) is considered key to ensuring compliance going forward³⁰. The allocation of such cases to a designated group of judges is an idea we are attracted to, and we will follow with interest developments in this regard.³¹

78. Experience dictates that legislative change will ultimately be tested in the courts and will therefore result in an initial increase in litigation. This has certainly been the case in England and Wales since the introduction of the Jackson reforms. However, this is expected to plateau, as authorities are established. The role of the appellate court (and in England and Wales, the Jackson five), judicial training and rules on enforcement are expected to be key in ensuring that any increase in the level of litigation is temporary.

Case management / case-flow procedures

79. It has been suggested to us that at the first case management hearing the court should decide what costs are proportionate in the circumstances of the case and that, whenever possible, the trial date should be fixed at the start of the case to focus minds and to ensure compliance with procedural time limits. We consider, however, that there are important exceptions to this general approach. For example, in the commercial court, timetabling is considered on a stage by stage basis. Personal injury actions are subject to case-flow management, minimising the need

³⁰ The *Mitchell* case is the first appeal concerning Civil Procedure Rule 3.9 which requires litigation to be conducted efficiently and at proportionate cost; and requires the court to enforce compliance with rules, practice directions and orders. The terms of the judgment summarise the issues surrounding this case as follows: "This is an appeal from two decisions of Master McCloud in relation to the recently introduced rules for costs budgeting in civil litigation... The question at the heart of the appeal is: how strictly should the courts now enforce compliance with rules, practice directions and court orders? The traditional approach of our civil courts on the whole was to excuse non-compliance if any prejudice caused to the other party could be remedied (usually by an appropriate order for costs). The Woolf reforms attempted to encourage the courts to adopt a less indulgent approach. In his Review of Civil Litigation Costs, Sir Rupert concluded that a still tougher and less forgiving approach was required. His recommendations were incorporated into the Civil Procedure Rules."

³¹ Subsequent cases in which the *Mitchell* decision has been applied include *Durrant v The Chief Constable of Avon and Somerset Constabulary* [2013] EWCA Civ 1624, *Aldington and 113 others v Els International LLP* [2013] EWHC B29 (QB) and *SG DP Petrol SRL v Vitrol SA* [2013] EWHC 3920

for court appearances (and indeed many personal injury actions will not call in court until the day of the proof). This matter will therefore require to be considered by the SCJC and any relevant committees when considering rules, whether for active case management or case-flow management.

80. Our understanding is that, in general terms, practitioners and litigants are keen to see active judicial case management but that it requires significant culture change on the part of the judiciary and court staff. Anecdotal evidence suggests that the High Court in England and Wales has adopted case management more readily than at district court level. It is considered that judicial training and appropriate ICT support (particularly where cases are docketed to individual judges, but also to assist with monitoring parties' compliance with court directions) are essential to support effective case management and culture change.

81. The SCCR considered the role of docketing (allocating an individual judge to the lifetime of a case). It recommended the introduction of a general model of case management, with cases proceeding subject to active case management, case-flow management or a mixture of both techniques as appropriate.³² We have heard that effective docketing systems have the potential to assist with identifying deadlines and enabling case management, leading to reduced rates of satellite litigation as there is less scope for practitioner error. However, we understand that docketing has the potential to be resource heavy, requiring judges to be allocated at reasonably short notice and may make managing the caseload of a court much more difficult. While we do not take a view on the matter, we note that consideration will need to be given to it in due course.

82. The English experience suggests that effective financial drivers as now reflected in the costs rules implemented following the Jackson Review are a powerful incentive to deliver change. With the conclusion of Sheriff Principal Taylor's Review, and his recommendations in relation to costs management, we are fortunate in Scotland to be in a position to take forward courts and costs reform in an integrated way. As part of this, consideration will need to be given to the SCCR recommendations in relation to the courts' powers to ensure case management orders are complied with.

83. We consider that costs reform is a necessary complement to ensure the success of procedural reform and recommend that rules for sanctions and enforcement should be taken forward as a priority.

³² SCCR, Ch. 5, para. 48 (Recommendation 52)

Drafting the rules

84. The key problems experienced in undertaking wide scale rules reform are around expense and delay. A comparison of the experience in Hong Kong with that of Alberta and England and Wales suggests that a comprehensive rewrite will inevitably incur much more resources. The Hong Kong rules revisions appear to have been successfully implemented and to have brought about real improvements without the cosmetic form of the rules having been changed.

85. While the SCJC will have a specialist drafting team to support the Rules Rewrite Project, we believe that, especially in the current economic climate and in light of the pressing need for reform, that its resources should be directed appropriately and proportionately. It is with this in mind that we have made our recommendations for the priority areas for reform, as detailed at paras. 111 - 136 below.

86. There is an ongoing need to revise the rules to implement primary and subordinate legislation and developments in case law. If this 'care and maintenance' work is significant the risk of delay is greater. The Civil Procedure Rule Committee (CPRC) in England and Wales to date has brought rules into force on the common commencement dates (April and October), which practitioners have indicated they prefer. However, the level of recent legislative activity has resulted in around 8 changes in the last year. We understand this can be challenging when seeking to deliver high quality rules, but in general, that maintaining dialogue with the relevant government department has greatly assisted with co-ordinating changes.

87. We consider it essential that the potential for external factors to bring about delays in the Rules Rewrite Project be taken into account. There is inevitably a reliance on government in respect of the timescales for commencing enabling statutory provisions or subordinate legislation, and assurances need to be sought that this will happen as planned and consideration given to contingencies. We understand that there is a desire to progress the modernisation and incorporation of the old rules into the new code in England and Wales but there are significant challenges in doing so with the level of activity required to ensure that the rules are in line with new legislation.

88. Work is underway in relation to raising awareness within government policy teams regarding the need to co-ordinate and discuss with the SCJC proposals for rules changes at an early stage. This has included face to face engagement and the preparation of an information note on how to request court rules and what factors might need to be taken into consideration when seeking rules changes. The majority of changes to civil rules emanate from government initiatives. We welcome the fact that the Scottish Government is working with the SCJC to ensure that these changes

can be properly co-ordinated so as to ensure progress on civil courts reform can be maintained.

89. We can see attractions in adopting a minimalist approach to rules in certain instances. By way of example, the procedure which has been adopted in the commercial courts in the sheriff court which has been lauded as an almost unqualified success. The rules are deliberately open ended. For example, Ordinary Cause Rule 40.3 provides:

“In a commercial action the sheriff may make such order as he thinks fit for the progress of the case in so far as not inconsistent with the provisions in this Chapter.”

90. Rule 40.14 provides:

“At any time before final judgement, the sheriff may-
(a) *of his own motion or on the motion of any party, fix a hearing for further procedure; and*
(b) *make such other order as he thinks fit.”*

91. Thus the rules state, on one view, that there are no rules. This open form of drafting is probably more suited to cases governed by active case management rather than the case flow model (e.g. personal injury) but it illustrates the possibilities of bringing about novel changes in procedure without undertaking substantial drafting commitments.

92. Another problem that may arise is the possibility of inadequate width of enabling powers in the rules of court. This has manifested itself in different ways in practice. In Alberta and Victoria, the legislative rule making power was to be amended before enacting the new rules.³³ The reforms suggested in Hong Kong necessitated changes to primary as well as secondary legislation (though that does not differ in principle from the recommendations in the SCCR, especially with regard to the creation of new courts and new judicial office holders). Broadly speaking, the same issue does not face the SCJC, which may “take into account proposals for legislative reform” in carrying out its functions.³⁴ It will be important to ensure the enabling powers contained in the Courts Reform Bill are broad enough to carry out the rules revisions.

³³ *Alberta Rules Project: Final Report*, para. 48; Victorian Law Reform Commission, *Civil Justice Review Report*, pp 711-712

³⁴ Section 3(2) of the 2013 Act

Supporting measures

93. There will be a wide range of implementation activity around the introduction of the reforms, such as judicial and staff training and changes to IT systems.

Specifically with regard to the introduction of the new rules, consideration should be given to what non-legislative measures might be necessary or desirable to support their implementation.

94. *We recommend that particular consideration should be given to the following.*

- a) **Pilots:** The experience in England and Wales suggests that pilots may be of mixed value as it may not be appropriate or effective to pilot a scheme in all circumstances. For example, we have heard the view expressed that pilot schemes would be suitable for costs management, but not for the introduction of QOCS. Further, in some cases it might be better to bring in a change across the board, as local experience might not be fully transferable. Further, if the pilot scheme was sub-standard the interest of that cohort of court users who had been subject to it might be adversely affected.

We recognise that there may be some value in running pilot schemes in certain circumstances but we recommend against piloting changes as part of any general approach.

- b) **Practice Directions:** Much of the CPR in England and Wales are supplemented by Practice Directions, which are prepared by the Committee and submitted to the Master of the Rolls. This enables consistency and coherency as well as efficiency. The rules cover mandatory matters, whereas Practice Directions contain guidance.
- c) **Guidance:** For party litigants and for those working with them, guidance is thought to be particularly helpful. Guidance on handling actions involving litigants in person has also been produced for the range of those within the system: lawyers representing the other party; the judiciary; and 'McKenzie friends'. Other organisations have also produced guidance, including the Bar Council's *A Guide to Representing Yourself in Court*, which is aimed for use by those more familiar with court processes.³⁵ Various pieces of guidance have been produced for litigants in person by the CJC in England and Wales, including guidance

³⁵ The Bar Council, [A Guide to Representing Yourself in Court](#), 2013

on small claims, which is available online and in Citizens Advice Bureaux, GPs' surgeries, etc.³⁶ That said, we consider that rules, particularly in respect of the simple procedure, should be drafted with a view to them being as simple and easy to understand as possible and with a view to minimising the need for supplementary guidance.

- d) Tables of 'concordance':** The Alberta Law Reform Institute rejected the adoption of a table of concordance (outlining the corresponding 'old' and new versions of rules) as a true concordance is not possible with entirely new legislation. It did, however, produce a helpful table which tracked the key changes to the rules.³⁷ While commercial providers may publish such tables, these are likely to be developed during the drafting process and as such could be made available to assist practitioners in the transition to the new rules.

Consulting on draft rules

95. In carrying out its functions, the SCJC has broad powers to "consult such persons as it considers appropriate". The purpose of consultation is to gather views and evidence in order that decisions may be taken in light of the fullest range of information possible. Public consultation can help to identify flaws, unintended consequences, and improved or alternative approaches. It can assist with the gathering of evidence to inform decisions and assess any impacts and it can contribute to communicating prospective change. We have therefore considered the specific question of whether draft rules should be publicly consulted on.

96. The experience in England and Wales suggests that proxy consultation can be achieved through use of committees, co-opting experts and interested parties to contribute to policy development and holding dedicated events, such as workshops or conferences. For example, the CJC Working Group on Access to Justice conducted a series of regional workshops aimed at implementing its recommendations in relation to arrangements for party litigants.

97. It is clear that full written public consultation exercises require time and resource. It is considered good practice that these should run for 12 weeks. Taking into account the additional time needed to prepare a consultation, analyse responses,

³⁶ Civil Justice Council, [A Guide to Bringing and Defending a Small Claim](#), April 2013

³⁷ Alberta Law Reform Institute, *Rules of Court Project Final Report, Appendix G – Table of Rules, Final Report No. 95*, October 2008

consider and (if necessary) revise draft rules, it is estimated that this could add around 6 months to the drafting process.

98. The SCJC itself is a consultative body, with a wide range of individuals and groups with an interest in the civil justice system contributing to its work through committee membership. In addition, the SCJC and its committees seek the views of others informally when considering specific issues.

99. *We recommend that in light of the consultative nature of the SCJC, the implementation timescales and the fact that many rules changes are likely to be technical and consequential in nature, public consultation on draft rules should not be adopted as standard. It is considered that consultation with key organisations should be considered on a case by case basis.*

100. It is helpful to make rules some time ahead of their entry into force (around 3 months) in order that the practitioners can become familiar with the changes and that publishers (i.e. rules commentators) can address the changes. In addition, making rules selectively available for a specified period ahead of finalising them might delay the process but can bring great benefits in finding flaws, and in communicating upcoming changes.

101. In light of the SCJC's function to "keep the civil justice system under review", we believe there should be a specific exercise in 'quality assuring' new suites of rules, and those that are to be brought into force in mid-2015 in particular.

102. *We consider that as the rules are to be prepared in phases, draft rules should be placed on the SCJC website in their draft form. This would promote the awareness of forthcoming changes to rules and would allow for any significant matters arising to be dealt with before entry into force. Wherever possible there should be at least a 3 month laying period for rules.*

Monitoring and evaluation

103. It is clear that a baseline must be established from which to measure improvements. Generally, however, there is a lack of sufficient civil court data from which comparisons can be drawn at a later date. In England and Wales, there appears to be a reliance on stakeholder groups, and anecdotal evidence in judging the success of certain reforms.

104. According to one speaker, there are seven questions to consider in respect of monitoring and evaluation:

1. Should the whole package of reforms be monitored or just targeted aspects?
2. What is the standard for measurement? What were the aims of the original review? Specified matters such as cost, efficiency, fairness or access to justice? Should measurement be at micro (case/court) or macro (economy) level or both?
3. Who should evaluate? Government/independent academics /another body?
4. Who/where are the sources of data - practitioners/judiciary/courts?
5. What methodology will be used? e.g. case based questionnaires, statistical data etc.
6. Time. How long should monitoring be carried out for? When should analysis take place?
7. Can evaluation identify and avoid skewed results; e.g. those gaming the system? Practitioners, judges and parties may perform differently if they are aware monitoring is taking place.

105. Full evaluation of any major reform programme will take a several years. We would envisage that there may be a role for the SCJC in contributing to any such evaluation in future, however, the extent of any contribution would be subject to discussion with the Scottish Government, SCS and others and would be dependent on the resources available to the SCJC.

106. The CPRC considers that the rules require constant and regular review. It finds that generally, it is sensible to review any significant change after about 18 months, to give the rule time to bed in and for any gaps/issues to become evident.

107. We note that one of the functions of the SCJC is to keep the civil justice system under review and we consider it essential that changes to the rules are subject to regular and comprehensive review. We therefore consider that a review of individual suites of new rules, to be carried out 18-24 months after their entry into force, should be built into the annual rules programme.

108. The starting point for any review is the principles to which the SCJC must have regard to in carrying out its functions.³⁸

³⁸ Section 2(3) of the 2013 Act.

PRIORITIES FOR REFORM

Immediate Priorities

109. It has been agreed through the *Making Justice Work* Programme that civil courts reform implementation should begin in 2015/16. Following discussions at official level with the Scottish Government and SCS, the Group has agreed the following areas of the Courts Reform Bill as priorities:

- the increase to the privative limit,³⁹
- the introduction of summary sheriffs and a new simple procedure,
- the creation of a Sheriff Appeal Court and the introduction of Appeal Sheriffs, and
- the creation of a specialist personal injury court with civil jury trials.

110. Each of these priority areas will require supporting rules to be drafted and supporting non-legislative measures to be in place before the relevant provisions of the Bill can be commenced. We refer to these, for convenience, as “structural reforms”.

111. *We consider that the following suites of rules changes should be taken forward as a priority and that drafting should begin on each of them during 2014.* To implement these changes, the Scottish Government will require to bring forward subordinate legislation to commence the relevant provisions of the primary legislation and others, in particular the Scottish Court Service, will be responsible for taking forward the practical arrangements (for example, IT changes) to support the reforms. Work will need to be carried out in conjunction with the other organisations responsible for implementation of civil courts reform, including in particular as to developing a clear plan so as to ensure as smooth a transition to the new arrangements as possible.

Privative Limit

112. The Courts Reform (Scotland) Bill currently makes provision for any case in which an order of value is sought, which does not exceed £150,000 to be brought only in the sheriff court. Rules will be required to support the proposed increase in the privative limit, in particular with regard to the calculation of the value of a claim, and to support the provisions for remitting cases.⁴⁰

³⁹ Renamed at section 39 in the Bill as the “exclusive competence” of the sheriff court.

⁴⁰ Section 39 of the Courts Reform (Scotland) Bill

Judicial Structures

113. The Bill provides for the introduction of the new judicial offices of summary sheriff and Appeal Sheriff and for the designation of specialist judiciary (including specialist sheriffs to hear cases in the specialist personal injury court).

114. The introduction of the new office of summary sheriff goes hand in hand with the introduction of the simple procedure. However, the simple procedure could be introduced prior to the appointment of summary sheriffs, with cases proceeding under it to be heard by sheriffs. It would also be possible for summary sheriffs to be created prior to the new simple procedure rules coming into force to deal with criminal business only. The creation of Appeal Sheriffs will be necessary for the establishment of the new Sheriff Appeal Court. Consequential amendments to rules will be required to support the new arrangements in respect of both these new offices.

115. The designation of specialist sheriffs does not depend on court rules and can be taken forward administratively.

Sheriff Appeal Court

116. The SCCR recommended the establishment of a national Sheriff Appeal Court which would hear summary criminal appeals from justices of the peace and the sheriff courts and civil appeals from the sheriff courts. This is provided for by Part 2 of the Bill. Under the Bill provisions, the existing Sheriffs Principal would automatically become Appeal Sheriffs and the Lord President would be able to appoint sheriffs (of at least 5 years' standing) as Appeal Sheriffs.

Specialist personal injury court, with civil jury trials

117. The SCCR concluded that a specialist personal injury court was necessary to maintain the benefits for litigants (in terms of cost and access to specialist expertise) and personal injury practitioners (in terms of economies of scale and convenience that are brought by a single central court where expertise exists and case law can be developed). As the specialist court can be expected to deal with the majority of personal injury cases below the proposed increase to the privative jurisdiction limit of £150,000, we believe that the specialist court requires to be introduced concurrently with that increase. We also consider that civil jury trials should be available in the specialist court from the outset. Rules in respect of both the procedure to be followed in the specialist court and for civil jury trials will be required for its establishment.

Simple procedure

118. The SCCR recommended a new simplified procedure, replacing small claim and summary cause procedure, for claims under £5,000,⁴¹ designed with party litigants in mind. The SCCR considered that the rules should be written in plain English and be as clear and straightforward as possible, recognising, however, the need to balance “informality with procedural propriety”.⁴²

119. The draft Bill would enable court rules to make different provision for different types of simple procedure cases (sections 70(2) and 97). Sections 75 and 76 of the Bill provide respectively for the transfer of cases to and from simple procedure.

120. Consideration will require to be given to the extent to which the small claims and summary cause rules are to be consolidated and simplified during the transition to the new arrangements, and also to whether separate provision should be made for particular types of case. Decisions on those matters will have implications on the timing of the introduction of the simple procedure.

Judicial case management

121. It is suggested that having case management in place at, or before, the redistribution of business to be effected by the increase to the privative jurisdiction limit would be of assistance in ensuring the smooth running of business in the sheriff courts. In addition, there may be certain aspects of the case management recommendations that might be considered worthy of being taken forward on their own merits (for example, the procedure to be followed in family actions is being considered by the SCJC Family Law Committee).

Rules for enforcement / sanctions

122. Following discussions with counterparts in England and Wales, we consider that consideration should be given to rules for sanctions and enforcement as a priority. The Scottish Civil Courts Review made several recommendations⁴³ in relation to the courts’ power to ensure case management orders are complied with, and it is thought that some of these could be taken forward ahead of any implementation of Sheriff Principal Taylor’s recommendations (however,

⁴¹ SCCR Chapter 5, paras. 125-131, Recommendations 79-84

⁴² SCCR, Chapter 5, para. 127

⁴³ SCCR, Ch.9 pp. 228 -233

consideration will need to be given as to whether they should be taken forward separately).

The creation of compulsory pre-action protocols⁴⁴

123. The SCCR considered that existing pre-action protocols in relation to personal injury and industrial disease claims should be compulsory, that in principle the protocols should apply to all categories of personal injury claim, that a protocol on clinical negligence actions should be developed and that the court should have power to make orders in relation to expenses and interest for non-compliance with pre-action protocols.

124. The Bill specifies that the Court of Session's power to make court rules includes power to make provision for "encouraging settlement of disputes...[and] action to be taken before such proceedings are brought by persons who will be party to the proceedings" (in respect of Court of Session procedure, at new subsection 5(2)(b) of the Court of Session Act 1988, introduced by section 97, and in respect of sheriff court and Sheriff Appeal Court procedure, at section 97(2)(b)).

125. Work relating to pre-action protocols could be taken forward separately from the structural reforms proposed in the Bill. The SCJC Personal Injury Committee is currently considering pre-action protocols and whether work in this regard should be carried forward prior to the Rules Rewrite Project getting underway.

Judicial review

126. The Bill provides for a time limit of three months for applications for judicial review and sets out a procedure for a new permission stage for judicial review. It is considered that there is merit in taking forward rules in respect of judicial review in early course.

Medium Term Priorities

127. The detail of the rules rewrite programme will need to be considered on an annual basis once drafting on the multiple sets of rules has begun. We consider that the following aspects of civil courts reform can be phased in once implementation of the early priorities identified above nears completion.

⁴⁴ SCCR, Ch. 8, paras. 33-53, Recommendations 102 to 106; sections 96 and 97(2)(b) of the Courts Reform (Scotland) Bill

Abolition of distinction between ordinary and petition procedure in the Court of Session

128. The SCCR recommended doing away with this distinction on the basis that the essential elements of the procedures are the same.⁴⁵ The SCCR recommended putting in place a standard initial procedure, with all actions to be initiated by a single document known as a writ and applying the standard term of ‘defences’ to all forms of procedure. It is suggested that as the structural reforms in the draft Bill do not depend on this change, that it could be taken forward as a standalone measure. However, very detailed amendments to the Rules of the Court of Session, and the relevant forms, will be required. There may be practical benefits in implementing this change at the same time as reforming judicial review procedure but the two matters are not considered to be dependent upon each other.

Alternative Dispute Resolution⁴⁶

129. The SCCR recommended against making use of Alternative Dispute Resolution methods compulsory. Under the Bill, new section 5(2)(b) of the Court of Session Act 1988 (introduced by section 96) and section 97(2)(b) would enable court rules to be made on the use of alternative dispute resolution procedures.

130. The SCJC Access to Justice Committee has a remit to review arrangements for the use of ADR methods in appropriate cases in the sheriff court and the Court of Session. It is considered that this work can be taken forward separately from the structural reforms proposed in the draft Bill.

Lay representation, party litigants, and vexatious litigants⁴⁷

131. Sections 92-94 of the Bill makes various provision for lay representation of non-natural persons (companies and other bodies) in civil proceedings, and provides that the Court of Session may make further provision in respect of lay representation by way of court rules.

132. Sections 100 to 102 of the Courts Reform Bill make provision for the making of vexatious litigation orders (replacing and updating the Vexatious Actions (Scotland) Act 1898) and orders relating to vexatious behaviour. Under the provisions, a vexatious litigation order may be made by the Inner House, in certain specified

⁴⁵ SCCR Ch. 5, para. 70, Recommendation 56

⁴⁶ SCCR, Ch. 7, paras. 24-39, Recommendations 96-101

⁴⁷ SCCR, Ch. 9, paras. 166-190, Recommendations 131-133; sections 100-102 of the Courts Reform(Sc.) Bill

circumstances, with the effect that a vexatious litigant may only institute civil proceedings with permission, and/or that that person may take a specified step in specified civil proceedings. Section 102 allows Ministers (having consulted the Lord President) to make regulations to enable the courts to deal with vexatious behavior. The Scottish Government has indicated that these provisions are modeled on the system of Civil Restraint Orders used in England and Wales, whereby a litigant must gain permission from the court before making applications in a particular case or cases.

133. It is considered that rules in relation to these areas can be taken forward separately from the structural reforms contained in the Bill. The SCJC's Access to Justice Committee is currently reviewing the arrangements for actions conducted by party litigants in the sheriff court and the Court of Session and will report to the SCJC on these matters in due course.

Enhanced case management

134. It is considered that several SCCR recommendations for enhanced judicial powers of case management may be taken forward independently. These are:

- abbreviated forms and adjustment of pleadings;
- the court's powers to order disclosure and lodging of documents relating to an action; and
- the arrangements for expert evidence;

Facilitating settlement⁴⁸

135. The SCCR recommended that the common law system of judicial tenders should be replaced by a rule regulating the making of formal offers by any party and specifying the detail of the rules. Consideration is being given to these recommendations within the context of Sheriff Principal Taylor's Review.

136. The Court of Session's rule-making powers as they stand do not currently extend to the regulation of offers as recommended by the SCCR.⁴⁹ It is not clear whether the draft Bill would enable such provision to be made by court rules and further discussions will therefore require to be held with the Scottish Government in this

⁴⁸ SCCR Ch. 8, paras. 86-92, Recommendations 107-111

⁴⁹ Chapter 34A (Pursuers' Offers) was introduced in 1996 following the Cullen Review of Outer House Business in 1995. In *Taylor v. Marshalls Food Group Ltd* (No. 2) 1998 S.C. 841 (First Div.), the provision in Rule 34A.6 for the pursuer to be entitled on beating his own offer to a sum equal to the taxed expenses, was held to be *ultra vires* and the Chapter was subsequently revoked.

regard. However, it is considered that this work can be taken forward separately from the structural reforms contained in the Bill, as part of any implementation of the recommendations of Sheriff Principal Taylor's Review of the Expenses and Funding of Civil Litigation in Scotland.

NEXT STEPS

137. This report has been prepared to enable the SCJC to agree its annual programme for 2014/15 and to enable the development of an annual rules rewrite programme. A specialist drafting team, made up of government lawyers, will be recruited in the coming months. That team will have the task of further scoping out the work required to draft the suites of rules we have identified as priorities and drafting the new rules themselves. We are due to prepare a final report by summer 2014. That will set out in more detail how we consider the new rules should be drafted, including how the aims of simplicity, modernisation and simplicity of the rules might best be achieved.

SUMMARY OF RECOMMENDATIONS

Uniformity v. specificity

Recommendation 1: We are of the view that separate rules for the sheriff court and the Court of Session should be retained. However, we consider that harmonisation of procedures should be pursued (and we note that this is one of the guiding principles to which the SCJC is required to have regard when carrying out its functions). With the exception of the simple procedure, which is to be designed with party litigants in mind and should retain a distinct and special nature, a consistent framework should be established, so that where appropriate, the rules of the sheriff court and Court of Session should be identical in procedure and wording.

(paragraph 53)

Simplicity, modernisation and accessibility of the rules

Recommendation 2: We endorse the approach adopted in England and Wales in relation to clarifying ambiguous language. We do not, however, recommend carrying out a specific exercise to identify any such ambiguities, rather that these should be addressed as rules are rewritten. Where judicial authority has brought a benefit, although out of date language has been used, then it may be beneficial to retain that language. We think that the question of whether an individual rule should be replicated in the new rules will require to be considered on a case by case basis; and the approach should only be adopted where it is considered necessary. However, we consider that out of date or complex language should not be restated in the simple procedure rules on this basis as party litigants should not be expected to rely on case law.

(paragraph 58)

Party litigants

Recommendation 3: As party litigants will be regular users of the simple procedure (which will replace small claims and summary cause procedure) proposed in the Courts Reform (Scotland) Bill 2014, we consider that it is vital that simple procedure is designed with party litigants in mind. As such, it ideally should not require complementary guidance (and indeed we suggest that the procedure itself could be drafted in such a way that it 'guides' litigants step-by-step through the court process).

(paragraph 63)

Accessing the rules

Recommendation 4: We consider that it would be beneficial to make the rules for Scotland accessible online in similar fashion to the way that they are made available in England and Wales, with clear links to relevant documents such as practice directions and guidance.

(paragraph 64)

Drafting rules

The need for an overriding objective

Recommendation 5: We are of the view that there should be a statement of principle and purpose in both the sheriff court and Court of Session rules, to which the court should have due regard, but that it should not override the other rules of court. The statement should be founded on recommendation 112 of the Scottish Civil Courts Review, and should indicate that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, within a reasonable time, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court, and that parties are expected to comply with the rules.

(paragraph 71)

Implementation

Managing Litigation

Recommendation 6: We consider it essential that management of litigation transfers to the courts, and that judges and the judicial system take a proactive stance in managing the progression of cases through the courts.

(paragraph 75)

Recommendation 7: We consider that costs reform is a necessary complement to ensure the success of procedural reform and recommend that rules for sanctions and enforcement should be taken forward as a priority.

(paragraph 83)

Supporting Measures

Recommendation 8: We recommend that particular consideration should be given to the following: pilots; practice directions, guidance, and tables of 'concordance'. We recognise that there may be some value in running pilot schemes in certain

circumstances but we recommend against piloting changes as part of any general approach.

(paragraph 94)

Consulting on draft rules

Recommendation 9: We recommend that in light of the consultative nature of the SCJC, the implementation timescales and the fact that many rules changes are likely to be technical and consequential in nature, public consultation on draft rules should not be adopted as standard. It is considered that consultation with key organisations should be considered on a case by case basis.

(paragraph 99)

Recommendation 10: We consider that as the rules are to be prepared in phases, draft rules should be placed on the SCJC website in their draft form. This would promote the awareness of forthcoming changes to rules and would allow for any significant matters arising to be dealt with before entry into force. Wherever possible there should be at least a 3 month laying period for rules.

(paragraph 102)

Monitoring and evaluation

Recommendation 11: We note that one of the functions of the SCJC is to keep the civil justice system under review and we consider it essential that changes to the rules are subject to regular and comprehensive review. We therefore consider that a review of individual suites of new rules, to be carried out 18-24 months after their entry into force, should be built into the annual rules programme.

(paragraph 107)

Priorities for reform

Recommendation 12: We consider that the following suites of rules changes should be taken forward as a priority and that drafting should begin on each of them during 2014.

- Increase to the Privative Limit
- Judicial Structures (introduction of the new judicial offices of summary sheriff and Appeal Sheriff)
- Creation of a Sheriff Appeal Court
- The creation of a specialist personal injury court, with civil jury trials
- Simple procedure

- Judicial case management
- Rules for enforcement / sanctions
- The creation of compulsory pre-action protocols
- Judicial review

(paragraphs 111 – 126)

Medium term priorities for reform

Recommendation 13: We consider that the following aspects of civil courts reform can be phased in once implementation of the early priorities identified above nears completion.

- Abolition of distinction between ordinary and petition procedure in the Court of Session
- Alternative Dispute Resolution
- Lay representation, party litigants and vexatious litigants
- Enhanced case management
- Facilitating settlement

(paragraphs 127 -136)

SOURCES AND BIBLIOGRAPHY

Meetings, interviews and events attended

Interviews at the Scottish Land Court and Edinburgh Sheriff Court (August – September 2013)

Meeting with Professors Michael Zander (LSE) and Adrian Zuckerman (Oxford) (2 December 2013)

Meeting with Civil Justice Council and Civil Procedure Rule Committee representatives (3 December 2013)

Attendance at UCL 'Justice After Jackson' Conference (12 November 2013)

Meeting with Secretariat Treasury Solicitors (14 November 2013)

Bibliography

Alberta Law Reform Institute, [*Alberta Rules of Court Project: Document Discovery and Examination for Discovery*](#), Consultation Memorandum No. 12.2, (October 2002)

Alberta Law Reform Institute, [*Alberta Court Rules Project: Judicial Review*](#), (August 2004)

Alberta Law Reform Institute, [*Alberta Court Rules Project: Final Report No. 95*](#), (October 2008)

The Bar Council, [*A Guide to Representing Yourself in Court*](#), (2013) (England and Wales)

Canadian Bar Association Task Force, [*Report on Systems of Civil Justice*](#), (1996)

Chief Justice's Working Party on Civil Justice Reform, [*Civil Justice Reform: Final Report*](#), (2004) (Hong Kong)

Civil Justice Council, [*A Guide to Bringing and Defending a Small Claim*](#), (April 2013)

Civil Justice Council, Working Group on Technical Aspects of Jackson Implementation, *Options for Proportionality, Part 36 Offers and Qualified One-way Costs Shifting* (October 2011) (England and Wales)

Civil Justice Reform Project, *Summary of Findings & Recommendations*, (2007) (Ontario)

Civil Justice Reform Group, *Review of the Civil Justice System in Northern Ireland Interim Report*, (1999)

Civil Justice Reform Group, *Review of Civil Justice System in Northern Ireland: Final Report*, (June 2000)

Department for Business Innovation and Skills, [Employment Tribunal Rules: Review by Mr Justice Underwood](#), (14 September 2012)

Dwyer D, *The Civil Procedure Rules Ten Years On*, (OUP) (2009)

Genn H, *Getting to the truth: experts and judges in the "hot tub"*, (2013) 32 CJQ 275,

Genn H, *Judging Civil Justice*, (CUP) (2010)

Genn H, *The Pre-Woolf Litigation Landscape in the County Courts*, (unpublished, 2002)

Goriely, Moorhead and Abrams, *More Civil Justice? The impact of the Woolf reforms on pre-action behaviour*, (Law Society & Civil Justice Council) (2002)

Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, (TSO) (December 2009)

Lord Neuberger, *A New Approach to Justice: From Woolf to Jackson, in Civil Justice Reform – What has it achieved?*, Meggitt (ed.) (Sweet & Maxwell) (2010)

Lord Neuberger, *Costs, Management, Proportionality and Insurance*, (PIBA Conference, 26 March 2010)

Lord Neuberger, 'Docketing: Completing Case Management's Unfinished Revolution', (9 February 2012) (9th Lecture in Implementation Programme)

Lord Woolf, [Access to Justice in England and Wales: Final Report](#), (1996)

Lord Woolf, 'A New Approach to Civil Justice', *Law Lectures for Practitioners Vol. 1996* (Hong Kong Law Journal Special Edition) (Sweet & Maxwell Asia) (1996)

Mr. Justice Ramsey, *Costs Management: A necessary part of the management of litigation*, (29 May 2012) (16th Lecture in the Implementation Programme)

Mr. Justice Ryder, *Judicial Proposals for the Modernisation of Family Justice*, (Judicial Office) (July 2012)

Mr. Justice Ryder, [The Family Justice Modernisation Programme](#), 4th Update (Judicial Office) (March 2012)

Scottish Civil Courts Review, [Report and Recommendations](#), (2009)

Sorabji J, 'Prospects for Proportionality: Jackson implementation' (2013) 32 CJQ p. 213

Steering Committee, [Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform](#), (Hong Kong) (2004)

Taylor Review, *Review of Expenses and Funding of Civil Litigation in Scotland: Report*, (2013)

Zander, M. 'A Titanic Challenge', *New Law Journal* pp. 743-744(2009)

Zuckerman A. 'The revised CPR 3.9: a coded message demanding articulation', (2013) 32 CJQ p. 123

Online sources

<http://www.bbc.co.uk/news/magazine-18144319>

<http://databank.worldbank.org/data/views/reports/tableview.aspx>

England and Wales

Civil Justice Council: <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc>

Civil Procedure Rule Committee:

<https://www.gov.uk/government/organisations/civil-procedure-rules-committee>

Australia

Queensland Parliamentary Library, General Distribution Research Team, [Civil Jurisdiction Reforms under the Civil Proceedings Bill 2011](#)

Victorian Law Reform Commission, [Civil Justice Review Report](#) (2008)

Canada

Canadian Forum on Civil Justice www.cfcj-fcj.org

British Columbia, Canada

British Columbia Justice Review:

http://www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp

Quebec, Canada

Canadian Forum on Civil Justice, Inventory of Reforms: <http://www.cfcj-fcj.org/inventory-of-reforms/qu%C3%A9bec-civil-procedure-reviewreform>

Ontario, Canada

Civil Justice Reform Project

<http://www.civiljusticereform.jus.gov.on.ca/english/default.asp>

Nova Scotia, Canada

<http://www.courts.ns.ca/rules/toc.htm>

March 2014

Scottish Civil Justice Council
Parliament House
Parliament Square
Edinburgh
EH1 1RQ



**Scottish
Civil Justice
Council**

www.scottishciviljusticecouncil.gov.uk